IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

VINCE W. STACEY, Respondent, v. LINA FLORENDO, Appellant.	No. 31767-2-II UNPUBLISHED OPINION

PENOYAR, J. — Lina Florendo (Lina) appeals the trial court's denial of her motion to dismiss Vince Stacey's (Stacey) parentage petition, arguing that it is not in the best interests of her child, D.J.F., to allow Stacey's parentage petition to proceed, that Stacey's petition was untimely filed, and that the Uniform Parentage Act (UPA) does not violate the constitution. Lina also argues that the trial court improperly appointed a guardian ad litem (GAL) to represent D.J.F.'s interests and erred in not awarding Lina attorney fees. We affirm but caution the trial court that it must make a determination of whether it is in the best interests of D.J.F. to allow Stacey's parentage petition to proceed.

FACTS

Lina gave birth to D.J.F. on October 24, 1995. At the time of D.J.F.'s birth, Lina and

Danilo Florendo (Danilo) were married and living together. D.J.F. lived with Lina and Danilo until they separated in January 1997. Lina had been romantically involved with Stacey in 1994. After Lina and Danilo separated Lina and D.J.F. moved to Seattle and lived with Stacey.

On November 22, 1997, Lina gave birth to another child, V.L.S. In 2000, Lina left Stacey, reconciled with Danilo, and Lina and her two children lived with Danilo. Danilo, Lina, and the children have lived together since 2000.

On May 30, 2000, Stacey filed a petition to establish parentage of D.J.F. and V.L.S. After Stacey missed appearances and filings in trial court, the court dismissed this action without prejudice.

On June 13, 2002, the Legislature enacted RCW 26.26.530, establishing that a parentage petition for a child with a presumptive father must be filed no later than two years after the child's birth. RCW 26.26.530(1). Before this statute was enacted, no time limit for filing a parentage petition existed. *See* Former RCW 26.26.060 (2000).

On October 21, 2003, Stacey filed a second petition to establish paternity of D.J.F. Lina moved to dismiss, arguing that Stacey's action was untimely because Stacey brought the petition more than two years after D.J.F.'s birth. Lina also requested attorney fees.

The trial court denied Lina's motion because it found that RCW 26.26.530 was unconstitutional. In its order denying the motion to dismiss and appointing a GAL for D.J.F., the court stated, "The case shall be permitted to continue as the court concludes that the statue does not treat men and women equally and the child should have someone who speaks for them." CP at 112. It appointed a GAL to represent D.J.F.'s interests and declined to award attorney fees to

Lina.

ANALYSIS

I. Statute of Limitations

Lina asserts that the trial court should have granted her motion to dismiss because Stacey filed his petition on October 21, 2003, more than two years after D.J.F.'s birth on October 24, 1995. She contends that Stacey's petition is therefore time barred.

Both parties concede that Danilo is D.J.F.'s "presumptive" father as defined in RCW 26.26.116(1)(a). Danilo and Lina were living together from January 1995 to January 1997, the possible time of D.J.F.'s conception, and Danilo is listed as D.J.F.'s father on her birth certificate. An action to adjudicate the parentage of a child having a presumptive father must be commenced within two years of the child's birth. RCW 26.26.530(1). Since D.J.F. was born on October 24, 1995, Lina asserts that Stacey had only until October 24, 1997, to file a parentage petition. We do not agree with Lina's assertion.

This court reviews a trial court's decision to dismiss a case on statute of limits grounds de novo. *In re Parentage of M.S.*, 128 Wn. App. 408, 412, 115 P.3d 405 (2005) (citing *Ellis v. Barto*, 82 Wn. App. 454, 457, 918 P.2d 540 (1996)).

It is well established that when the legislature enacts a shortened statute of limitations, the time for bringing claims that accrued before the new law's enactment begins to run on the new statute's effective date. *Parentage of M.S.*, 128 Wn. App. at 415. Accordingly, the two-year statute of limitations of RCW 26.26.530 began to run on June 13, 2002, and Stacey's petition on October 21, 2003, was timely filed.

In supplemental briefing, Lina argues that the court's statute of limitations holding in the

Parentage of M.S. was dictum, that the *Parentage of M.S.* was wrongly decided, and that RCW 26.26.530 is not a statute of limitations of nonclaim. We disagree.

In the *Parentage of M.S.*, the court held that a presumed father's parentage petition was timely because the two-year statute of limitations under the revised UPA did not begin tolling until the law was enacted on June 13, 2002. *Parentage of M.S.*, 128 Wn. App. at 415. The child was born on June 8, 2000, and the father attempting to establish parentage filed his petition in May 2004. The court held that the May 2004 petition was timely because it was filed within two years of June 13, 2002. *Parentage of M.S.*, 128 Wn. App. at 415. Relying on the *Parentage of M.S.*, we hold that Stacey's petition was also timely because it was filed within two years of the revised UPA's enactment, June 13, 2002.

The trial court did not consider the above analysis in reaching its decision. However, we may sustain a trial court on any correct ground, even if the trial court did not consider it. *Nast v. Michels*, 107 Wn.2d 300, 308, 730 P.2d 54 (1986) (citing *Reed v. Streib*, 65 Wn.2d 700, 709, 399 P.2d 338 (1965)). We therefore affirm.

In so doing, however, we note that although Stacey's petition was not time barred, the continuation of Stacey's paternity petition presents a tension between D.J.F. receiving an accurate paternity determination and the possibility that the stability of her current familial environment will be threatened. Lina had a romantic relationship with Stacey in 1994, and it is therefore possible that Stacey is D.J.F.'s biological father. However, D.J.F. has been living with Lina and Danilo, not Stacey, since 2000.

The trial court made no determination of whether it is in D.J.F.'s best interests to permit

Stacey's paternity petition to continue. The best interests of the child control all actions dealing with the care and welfare of minor children. *McDaniels v. Carlson*, 108 Wn.2d 299, 309-10, 738 P.2d 254 (1987) (citing *In re the Welfare of Aschauer*, 93 Wn.2d 689, 695, 611 P.2d 1245 (1980); *In re the Welfare of Becker*, 87 Wn.2d 470, 553 P.2d 1339 (1976); *In re the Matter of Dombrowski*, 41 Wn. App. 753, 756-57, 705 P.2d 1218 (1985)). A child's interests are especially paramount in determining whether to allow a paternity action to continue by someone who is outside the present family and the trial court must reach a conclusion regarding the best interests of a child before allowing the action to continue. *McDaniels*, 108 Wn.2d at 313.

The issue of whether it is in the best interests of D.J.F. to allow Stacey's paternity action to continue is not before this court. It is likely that the trial court has not yet entered a finding on the child's best interests because the child needed a GAL appointed to represent her interests. During argument, the trial court stated, "I think this child clearly needs someone to speak for her. . .just looking at the track records of the parents it doesn't appear that they've ever bothered to put the child's interests first. . ." RP at 18-19.

Although we affirm the trial court's ruling denying the motion to dismiss because it is not barred by the statute of limitations, we caution the trial court that a determination of whether it is in the best interests of D.J.F. must be made in order for the parentage action to continue.

II. Constitutional Issues

Lina argues that the trial court erred in finding that the UPA is unconstitutional. All courts should assume the constitutionality of a statute unless the law is incompatible with the constitution beyond a reasonable doubt. *State ex rel. Case v. Howell*, 85 Wash. 294, 297, 147 P.

1159 (1915); *State v. Watkins*, 676 So. 2d 247, 249-50 (Miss. 1996), *State v. Cannarozzi*, 186 A.2d 113, 115 (N.J. Super. Ct. App. Div. 1962); 16 Am. Jur. 2d *Constitutional Law* § 116 (1998). Accordingly, "[t]he questioned act must be upheld unless some express or fairly implied limitation upon the legislature's power to enact it is found in the constitution." *Union High School Dist 1. v. Taxpayers of Union High School Dist. 1*, 26 Wn.2d 1, 6, 172 P.2d 591 (1946).[1]

We leave the question of whether RCW 26.26.530 is unconstitutional for another day when the issue is properly before us. A reviewing court should not pass on constitutional issues unless absolutely necessary to determinate the case. *Linda D. v. Fritz C.*, 38 Wn. App. 288, 296-97, 687 P.2d 223 (1984) (citing *State v. Hall*, 95 Wn.2d 536, 539, 627 P.2d 101 (1981)). While we question the merits of the trial court's ruling, we need not address the constitutional issues raised at trial court because we hold that Stacey's petition was not time barred under the UPA.

III. Guardian ad Litem (GAL)

A trial court may appoint a GAL for a minor child if it finds that the child's interests are not adequately represented. RCW 26.26.555(2). A trial court's appointment of a GAL is presumed valid, unless there is a showing of clear error or abuse of discretion**.** *In re the Guardianship of Hamlin*, 102 Wn.2d 810, 816-17, 689 P.2d 1372 (1984) (citing *In re Colyer*, 99 Wn.2d 114, 136-37, 689 P.2d 1372 (1983)).

Here, the trial court appointed a guardian ad litem because it found that neither parties

[1] In ruling RCW 26.26.530 unconstitutional here, the trial court failed (1) to apply the presumption of the statute's constitutionality, (2) to articulate any rationale for its ruling, (3) to address or to articulate a constitutional limit on the Legislature's power to enact such statute, and (4) to find the statute unconstitutional beyond a reasonable doubt. *See Union High School*, 26 Wn.2d at 6.

were serving D.J.F.'s interests. The trial court did not abuse its discretion in appointing a guardian ad litem for D.J.F. Accordingly, we affirm.

IV. Attorney Fees

Under the UPA, the trial court has discretion to award attorney fees and we will not disturb its ruling unless it was manifestly unreasonable or based on untenable reasons. *In re the Marriage of T.*, 68 Wn. App. 329, 334, 842 P.2d 1010 (1993). We hold that the trial court acted within its discretion in not awarding attorney fees to Lina.

We affirm.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

PENOYAR, J.

I concur:

BRIDGEWATER, J.

Hunt, J. — (dissenting in part) I agree with the majority that generally we refrain from deciding constitutional issues when we can resolve a case on non-constitutional grounds. *See Linda D. v. Fritz C.*, 38 Wn. App. 288, 296-97, 687 P.2d 223 (1984) (citing *State v. Hall*, 95 Wn.2d 536, 539, 627 P.2d 101 (1981)). I disagree, however, with the majority's leaving intact the trial court's unsupported ruling that RCW 26.26.530 is unconstitutional. Majority at page 6. I would vacate the trial court's ruling, without addressing the constitutionality of the statute, for the following reasons.

As the majority acknowledges, all courts should assume the constitutionality of a statute unless the law is incompatible with the constitution beyond a reasonable doubt. *State ex rel. Case v. Howell*, 85 Wash. 294, 297, 147 P. 1159 (1915); *State v. Watkins*, 676 So. 2d 247, 249-50 (Miss. 1996), *State v. Cannarozzi*, 186 A.2d 113, 115 (N.J. Super. Ct. App. Div. 1962); 16 Am. Jur. 2d *Constitutional Law* § 116 (1998). Accordingly, "the questioned act must be upheld unless some express or fairly implied limitation upon the legislature's power to enact it is found in the constitution." *Union High Sch. Dist 1. v. Taxpayers of Union High Sch. Dist. 1*, 26 Wn.2d 1, 6, 172 P.2d 591 (1946). Again, as the majority acknowledges, in ruling RCW 26.26.530 unconstitutional, the trial court failed (1) to apply the presumption of the statute's constitutionality, (2) to articulate any rationale for its ruling, (3) to address or to articulate a constitutional limit on the Legislature's power to enact such statute, and (4) to find the statute unconstitutional beyond a reasonable doubt. *See Union High Sch.*, 26 Wn.2d at 6.

In my view, it is improvident and potentially misleading to other courts for us to leave intact the trial court's unsupported ruling. I agree with the majority that we need not address the

merits of the statute's constitutionality. But, without addressing the merits, we can and should reverse this ruling based on the trial court's failure to apply the presumption of constitutionality and failure to apply well-recognized standards for reviewing a statute's constitutionality.

Therefore, I would (1) vacate the trial court's ruling that RCW 26.26.530 is unconstitutional; (2) leave that question for another day when the issue is properly before us, as the majority suggests; and (3) in the meantime, apply the presumption that the statute is constitutional. *Howell*, 85 Wash. at 297.

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Hunt, J.